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# Rethinking the secular: religion, ethics and science in food regulation

## Abstract

This paper explores some issues at the intersection of regulation and religion, as they apply to food. It reports on a work in progress examining the regulations and values that affect choices at food and drink outlets in an inner suburban street in Sydney.

It is part of a larger projected study of food as a central social, material and religious concern. In it we are exploring questions around community relations in a culturally and religiously diverse society. Here I focus on the ways religious, ethical and scientific considerations interact with regulatory regimes, whether those of government, industry, or religious bodies. Three case studies explore this range of intersecting claims and responsibilities. Religious requirements may be regulated by a religious council, Beth Din or Ulama; food safety is monitored by government and industry bodies; while consumer and animal rights organisations may be involved in demands for particular standards and the reliability of various claims for food. There is continuous negotiation between government, industry, religious or ethical bodies and consumer advocates over labelling and other regulations. Since food is ultimately a matter of consumption (indeed, it is the ultimate form of consumption), even religious regulation has much in common with other forms of consumer protection. The consumer wants to know, with some guarantee of the reliability of the certification or labelling, whether their food is safe, free range, halal, healthy, and so on.

## Keywords

ethics, science, food, rethinking, regulation, secular, religion

## Disciplines

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*UN Human Rights Council ceiling Geneva UN Photo/Jean-Marc Ferré*

Centre for International Governance and Justice

Strengthening the international human rights system:  
Rights, regulation and ritualism

 **Working Paper No. 1/2013**

## **Rethinking the secular: Religion, ethics and science in food regulation**

**Richard Mohr**

# Rethinking the Secular: Religion, ethics and science in food regulation<sup>1</sup>

Richard Mohr  
March 2013

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## **Secularism: old, new and post-**

This paper explores some issues at the intersection of regulation and religion, as they apply to food. It reports on a work in progress examining the regulations and values that affect choices at food and drink outlets in an inner suburban street in Sydney.

It is part of a larger projected study of food as a central social, material and religious concern.<sup>2</sup> In it we are exploring questions around community relations in a culturally and religiously diverse society. Here I focus on the ways religious, ethical and scientific considerations interact with regulatory regimes, whether those of government, industry, or religious bodies. Three case studies explore this range of intersecting claims and responsibilities. Religious requirements may be regulated by a religious council, Beth Din or Ulama; food safety is monitored by government and industry bodies; while consumer and animal rights organisations may be involved in demands for particular standards and the reliability of various claims for food. There is continuous negotiation between government, industry, religious or ethical bodies and consumer advocates over labelling and other regulations. Since food is ultimately a matter of consumption (indeed, it is the ultimate form of consumption), even religious regulation has much in common with other forms of consumer protection. The consumer wants to know, with some guarantee of the reliability of the certification or labelling, whether their food is safe, free range, halal, healthy, and so on.

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<sup>1</sup> This paper was written for a workshop on 'Human Rights and Regulation' focusing on Eve Darian-Smith's (2010) work on religion and rights at the Centre for International Governance and Justice in RegNet at the Australian National University, 5 September 2012. This is a work in progress, expanded from my presentation at that workshop, for online publication on the CIGJ website.

<sup>2</sup> This work grew out of a collaboration with Nadirsyah Hosen (University of Wollongong) and other contributors to our edited book *Law and Religion in Public Life* (2011). Those contributors took a variety of approaches to the relationship between law and religion. Our subsequent work has been an attempt to study that relationship in more detail, with a focus on the legal and religious regulation of food. I acknowledge in particular Paul Babie's stimulus.

While this may be seen as a fairly straightforward exercise in regulation for consumer protection, at another level it casts light on one of the most contentious issues of our time: the relations between reason, religion and law. These have been questioned anew, with the recent challenges to the 'secularization thesis' suggesting that it is 'overly simplistic and grossly inadequate' (Darian-Smith 2010: 286).

[C]an we reconcile the enduring presence of religion in western societies with the dominant assumption that law is a logical, rational and objective enterprise, free of any connection to spiritual belief? (Darian-Smith 2010: 10-11)

This question is often put in terms that reflect or question the traditional separation between faith and law, or church and state: an ideology of secularism. Does religion have any role to play in establishing public norms? Does religion pose a challenge to a rational or scientific administration of public affairs? Indeed, can science or reason, any more than religion, be a guide to law and regulation?

Underlying my interest in the interaction of various (perhaps competing) value systems in the development of regulation is the hope that I can cast some light on the contemporary problems of secularism. I respond to the challenge of the secular, prompted by several recent themes and concerns in the discourse on secularism.

We hear a certain nostalgia, or worse, from many liberal or secularist scholars. The very aggression of the secularist counter-offensive has prompted me to explore new ways of conceiving secularism, whose purported neutrality and peaceful promise have been compromised by the divisive diatribes of authors like those whom Terry Eagleton (2010) has called, collectively, 'Ditchkins'. This militant secularism may accept religion confined to the private sphere, but is more likely to identify it as a troublesome irrational force which is to be excluded from public life lest it corrupt impartiality and sow seeds of unrest and conflict. The very diversity of contemporary societies is invoked in support of this view. In once-Christian societies which are now home to substantial minorities of non-believers and believers in other religions, the very notion of religion is seen as inflammatory and potentially divisive. It plays the role in the politics of fear that ethnic identification of Australian soccer clubs was supposed to have when they were called 'Croatian', 'Serbian' or 'Hakoah'. Names like 'Melbourne Victory', 'Brisbane Roar' or the 'Sky Blues' are presumed to be sufficiently neutral to overcome the threat of religious conflicts and ethnic brawls. In the same way, criteria for choice of public goods compete to be secular and innocuous, 'evidence-based' and perhaps even 'value-free'.

Elsewhere I have questioned the universalism of secularism in light of its Christian origins (Mohr 2011, Tierney 1982). While that is not an argument against secularism as such, it does prompt further inquiry into the role of secular values as an alternative to religious ones in an ethnically and religiously diverse world.

Another response to the crisis of secularism is the view that it has been superseded by a 'post-secular' age, in which religious motivations and spirituality are rediscovered. This approach questions whether the secular universe of reason and science provides sufficient grounds for making hard moral and ethical choices. Thinkers as diverse as Jürgen Habermas (2008), Rosi Braidotti (2008) and Steven D. Smith (2010) welcome a 'postsecular' polity (in the case of the first two), or one in which religious values are admitted as a ground for ethical or even political claims (in the case of Habermas and Smith).

I am sceptical about such alternatives. I have already expressed my concerns over a militant and divisive secularism, yet we need a more nuanced approach to value choices in public life than those put forward in the name of competing established religions. In this I agree with feminists like Braidotti or Margaret Davies (2011), who both advocate a richer framework for ethical debate than those sanctioned by traditionally accredited religious or political leaders. I am also interested to understand the legitimate role that might be played by rational and scientific discourse if they were to enter into the stimulating arena of public debate as engaged and valued participants and not just 'conversation stoppers'.<sup>3</sup>

## The research

Having outlined some of my epistemological and ethical interests, I will report on a research project which, despite its modest dimensions, I hope will illuminate a number of these issues. The subject and site of this research was prompted by a concern to discover the roots and conditions of an inclusive and tolerant multiculturalism, in explicit opposition to the divisive and intolerant views of some conservative politicians, atheist crusaders or religious zealots.

It proceeded in three stages: a formulation of some very rough questions about how law, religion and 'scientific' or rational values and institutions may interact in private and public decisions regarding food. Then there was a period of empirical research, focussed on the semiotic presentation of food options and regulation in a multicultural Sydney neighbourhood (described in the following paragraphs). Finally, that data has been analysed through a number of lenses. Early oral presentations of the work focussed on social and religious implications, with particular interest in food, culture and identity. Pending further development of that side of the study, the present report focuses on the specific issues of law, religion and science in food regulation. The data from the empirical and regulatory study was analysed by identifying references to ethics, religion or science. Realising that this came down to the intersection of several institutions or movements based on particular systems of values, I went back to the literature on these issues, in order to interpret and trace the implications of the data. The empirical and regulatory research, into three specific issues, is outlined in the section on the case studies. The analysis of the intersecting value systems follows, in the concluding section.

The initial research (in June-August 2012) mapped all of 117 food outlets in Marrickville Road, which forms the central spine of the Marrickville Local Government Area (LGA) about 6 km south west of the Sydney CBD. It runs through the middle of the suburb of Marrickville, from Sydenham station in the east to Dulwich Hill in the west. The area was for a long time one of the first stops for new immigrants who, over the decades, have been Greeks, then Vietnamese, Chinese and Pacific Islanders. Portuguese and Italians, from a relatively early stage of post-World War II immigration, are also conspicuous at the Dulwich Hill end of the street. The area is rapidly gentrifying<sup>4</sup>, but it is still home to many immigrants: one in three households speaks more than one language at home. (Compared with 1 in 4 in New South Wales, and 1 in 5 in Australia.) The main languages spoken are Greek, Vietnamese, Arabic, Portuguese and Cantonese.

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<sup>3</sup> Smith (2010: 218) turns the tables on Rorty's claim that religion is a 'conversation-stopper': 'Rorty's opponents are not telling him: "Stop talking secular." Rather it is Rorty and like-minded thinkers who issue the injunction: "Don't talk religion."'

<sup>4</sup> Cavia et al. (2008: 8) effectively problematise this concept: 'the process of gentrification is not so much an explanatory factor as the condition of possibility of new social relationships.'

Religious affiliation in Marrickville is less to the dominant churches than in other parts of NSW, while the greatest proportion profess no religious affiliation (33%). Eastern Orthodox and Buddhist adherents are respectively three times and twice as prevalent in Marrickville as in Australia as a whole. There are Anglican, Catholic and Baptist churches within the study area, and a Greek Orthodox church and a Lebanese Maronite complex within a hundred or so meters of it. There are no mosques or synagogues within the study area. The local government area is adjacent to two important Muslim localities, Arncliffe (in the Rockdale LGA) to the south and the Canterbury LGA to the south west.

Politically, the local council is dominated by Labor and Greens, while the parliamentary representatives are left Labor. The local Federal Member is the Labor Minister Anthony Albanese, who, during parliamentary debate of a controversy about sacred Aboriginal beliefs in the Hindmarsh Island case some years ago, taunted conservative members by questioning their reaction if the inquiry were to be 'into your beliefs; into whether you can prove the Holy Trinity exists' (Maddox 2005: 133). Local council elections held in September 2012 saw two Liberal councillors elected for the first time in Marrickville. One of them, the vice president of the synagogue in neighbouring Newtown, had been vocal in the campaign against the Council's boycott, divestment and sanctions policy towards Israel.<sup>5</sup> The Greens' influence diminished at that election. Religion is entwined in indirect and distant ways in Marrickville local politics. The religious conflicts tend to be elsewhere: the Middle East or Hindmarsh Island.

The study area of this project covers the full 2.7 km length of Marrickville Road, and one block either side of that street<sup>6</sup>. It includes fruit shops and supermarkets, cafes and restaurants, butchers and bakers, takeaway food shops and convenience stores. The food preparation factories (of which there are many in the municipality, and a number in the study area) were excluded unless they specified sales direct to the public. The research identified any signs on the food outlets displaying any ethnic or national affiliation, as well as any regulatory regimes under which they operate. In addition to English language signs, seventeen different cultures were identified, the most common being Vietnamese, Chinese, Greek, Thai, Italian and Turkish. The food shops and restaurants are regulated by Council's Local Environmental Plan as well as various industry, consumer, government and religious codes.

In the following section I explore three of the regulatory regimes that are acknowledged in signage on the various premises, devoting a brief case study to each of the following:

- Free range
- Halal
- Food Safety.

## Case studies

### Free range

Free range claims are made in advertising on takeaway food shops, as well as on eggs and poultry products in the various supermarkets. A large poster for Lilydale chickens displayed

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<sup>5</sup> Henry Benjamin, 'A Jewish Voice at Marrickville Council', *J-Wire* 14 February 2011. <http://www.jwire.com.au/news/a-jewish-voice-at-marrickville-council/15073> accessed 4 February 2013.

<sup>6</sup> The side streets were sampled as far as pedestrians could walk on them without any vehicular road or lane crossing the footpath. The only significant concentrations of shops are in New Canterbury Road (east side only was sampled) and Illawarra Road, south of Marrickville Road.



on the Classic Food Bar in Marrickville is headed 'Free to roam' above a photograph of chickens on grass under gum trees. 'Free range chicken' is written at the bottom.

Vague or misleading descriptors such as 'barn raised' and 'free to roam' have become the subject of legal action. The Australian Competition and Consumer Commission (ACCC) has taken action in the Federal Court of Australia against three poultry suppliers including Baiada Poultry Pty Limited, the supplier of Lilydale Free Range Chickens, for misleading and deceptive conduct (VID 974 of 2011). The ACCC alleges that phrases such as 'free to roam' are misleading and deceptive because the chickens 'do not, as a practical matter, have substantial space available to roam around freely'.



Signs on two take away cooked chicken shops on either side of Marrickville Road in Marrickville.

Consumer demands for free range poultry products, based on ethical concerns for animal welfare, have become increasingly apparent. Egg and poultry producers have responded by increasing the supply. One way to do this is to redefine 'free range'.

There are a number of competing certifications, with different stocking densities (indoor/outdoor), some prohibiting beak trimming. Bodies sponsoring these certifications range from Australian Certified Organic and state free range farmers' associations (with some of the strictest limits at around 1,000 birds per hectare) through the RSPCA to the Australian Egg Corp Ltd (AECL).

The AECL sets very low standards for 'free range' and argues that densities under the Model Code of Practice for the Welfare of Animals should increase to 20,000 birds per ha. In support of this, they cite Scottish Agricultural College research, and they commissioned their own survey of consumers. Consumer advocates *Choice* have disputed AECL's use of this research, and carried out their own survey.

When [*Choice*] asked consumers what they'd consider to be a reasonable maximum outdoor stocking density. ... 65% of respondents said they didn't know. This reinforces our belief that a maximum stocking density shouldn't be predominantly based on consumer research, but



rather on a broader body of independent, scientific research in conjunction with consumer research.' (Clemons 2012: 22)

*Choice* campaigns for clarity and standardisation of labelling, so that consumers may make informed choices about the food they buy. This leads to demands for standards, regulations and well-understood terms on which to base buying choices. In any of these debates, there are disputed criteria, based on different interests and values. Poultry farmers may have economic interests that are at odds with those of humanitarians, or even chickens (if they can be said to have interests). These interests may be fought out in the name of various values (to paraphrase Marx 1970: 21).

If we were to argue, with some secularists or certain Marxists, that these values are essentially arbitrary, irrational, or an ideological smokescreen for material interests, it may be difficult to find a way through such disputes. And yet the welfare of sentient beings can be seen to require that animals be allowed to express natural behaviours and be protected from suffering. Such values are held by many people, and can be defended on a variety of ethical, political or religious grounds. They are subject to rational and ethical debate.

However, as *Choice* finds when surveying consumers who would choose free range products, it is difficult to know just where to set specific standards. Serious public debate on matters of values should be informed by scientific research and even philosophical analysis. If the average consumer has no idea what stocking densities are necessary to allow chickens to walk, scratch and peck, then ethological and veterinary research can be informative.

### Halal

Two shops in the study area advertise that their food is halal. On the other side of Marrickville Road from the Classic Food Bar that sells cooked 'Free to Roam' chickens there is Chicken Fantasy, which advertises that their cooked chicken is halal. Just off Marrickville Road in New Canterbury Road is the Orange'O convenience store and halal butchery. While some consumers decide their choice of food according to the ethical principle of animal welfare, others apply the religious criterion that it should be halal.<sup>7</sup>

Just as we saw in the case of free range certification, halal certification may be awarded by a number of different bodies. These are not associated with industry but rather with various Islamic organisations. Eighteen certifiers across Australia are listed by the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF), according to whether they are recognised by particular export markets in Muslim countries.<sup>8</sup> Four of them are in New South Wales, including two widely recognised bodies, the Australian Federation of Islamic Councils and the Supreme Islamic Council of Halal Meat in Australia. It is not known how many other bodies may purport to certify halal products sold in the study area.

While these certifying bodies may compete in a market sense, offering their services to various producers, they must also compete for theological credibility. Bodies with a range of respected Islamic scholars gain wider acceptance than do more commercial organisations. More liberal Muslims may prefer certain authorities, while other sects may have their own

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<sup>7</sup> It would be interesting to explore the similarities and differences between religious and broader ethical values. From a sociological point of view, it appears that religious positions are more associated with institutional hierarchies and codified texts. Ethical positions may move in that direction over time. There is little room for further developing this theme here.

<sup>8</sup> <http://www.daff.gov.au/aqis/export/meat/elmer-3/list-islamic-halal-certification> accessed 12 February 2013.

preferences. *The Economist* (2013) recently quoted a restaurateur in the London Borough of Tower Hamlets saying he did not bother with certificates, but that 'he knows and trusts his suppliers and his customers know and trust him.'

As in ethical considerations, acceptance that a product is halal (like free range) requires some known and accepted standards, and trusted and consistent authority or authorities. In the absence of government certification or adjudication, religious, like ethical consumers must simply determine which authority or supplier they trust. Consumer demands for guidance and credibility, informed by ethical, scientific or religious, debate may require more transparent regulation.

The research has not remarked any local conflict—political or religious issues—associated with halal food. Nationally there have, of course, been several egregious instances of populist and intolerant politicians denigrating halal food.<sup>9</sup> There are also areas where religious and other ethical requirements may come into conflict. It is of interest to this study of religious, ethical and scientific bases of regulation to note debates over whether the ethical demands for humane treatment of animals conflict with religious demands for halal slaughter.

This debate often centres on possible conflicts between an ethical demand that an animal be stunned before slaughter and a religious demand that the animal be alive until it is slaughtered correctly. In the Australian context, the live export of animals to Indonesia and the Middle East, for halal slaughter at their destination, adds another dimension to the debate.

The animal welfare arguments are based on minimising animal suffering. Stunning renders animals unconscious, to anaesthetise them so they do not feel pain, or possibly so they are not aware of their fate. The anaesthetic motivation needs to be tested against the methods used for stunning: whether they are less painful or traumatic than the method of slaughter. The pain of either should surely be minimised. The question of awareness is a difficult one in the case of animals which, while they obviously feel pain and may be stressed by certain methods of handling, may not have a conception of life, death or the future.

Animal Liberation (South Australia) has advocated halal slaughter within Australia as a humane alternative to live exports, which cause suffering and death to animals crowded into ships. Liaison between Australian and overseas governmental and religious authorities, such as those listed on the DAFF website, can assist in this move.

The answer is to increase the number of Halal slaughterhouses in Australia so that animals are handled and killed according to Australian standards. ... There are already Halal slaughterhouses in Australia with religious officials present. Stunning has been accepted as long as does not mark the carcass (electrical or non-penetrating captive bolt stunning). There is already a robust trade in chilled and frozen meat to both the Middle East and Indonesia.<sup>10</sup>

Other religious considerations concern the definition of stunning and death. Some Islamic scholars accept stunning as long as it is reversible: the animal should not be so damaged by the stunning that it cannot return to life and normal consciousness.

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<sup>9</sup> e. g. Senator Cory Bernardi, see Lewis (2011) and W.A. Liberal MP Luke Simpkins <http://www.perthnow.com.au/news/western-australia/we-are-unknowingly-being-converted-to-islam-says-cowan-mp-luke-simpkins/story-e6frg13u-1226206404318> accessed 23 February 2013.

<sup>10</sup> <http://animalliberation.org.au/national-rallies-against-live-export/> accessed 16 February 2013

There is scope for detailed investigation into these matters, both from an ethological point of view and in regard to the physical impact (infliction of pain) of different methods of stunning or slaughter. Islamic scholars and thoughtful animal rights advocates could work with scientific, philosophical and empirical research on methods of slaughter to reach more rigorous and well-founded conclusions on questions of animal welfare and halal slaughter.

### Food safety

Victoria Yeeros, on the corner of Marrickville and Victoria Roads, sells take-away spit grilled yeeros (or gyros in the Melbourne transliteration from Greek), and has a yeeros meat supply premises next door on Victoria Road. Its sign specifies 'Quality assurance through HACCP', 'NSW Food Safety Authority' and 'Authorised by NSWMI'. These three certifications point to a maze of interlocking codes, authorities and industry organisations. All are focused on the safety of food from the point of view of the health of the consumer, and specifically on its freedom from bacteria and other infectious diseases.<sup>11</sup>

All premises that supply food are subject to regulation by the NSW Food Safety Authority ('safer food, clearer choices') and the local Council. Council enforces food safety standards, through regular inspections, under the coordination and regulation of the state government's FSA. FSA publicises adverse findings through a 'name and shame' website that maintains notices for 12 months from first notification. Only one business in the study area was 'named and shamed' on that website during the study period (June-July 2012). In February 2013,<sup>12</sup> four more premises in Marrickville Road Dulwich Hill had been added (a butcher, a baker and a Chinese restaurant) and five in Marrickville Road Marrickville (a fish shop, two bakers, an Indian take away and a cake shop).

The Hazard Analysis Critical Control Point system (HACCP) was developed from the international Codex Alimentarius as a means of ensuring food safety. It is promoted by the World Health Organisation and implemented and accredited through national private companies (e.g. HACCP Australia).

The FSA classifies 'potentially hazardous foods', to which a '2 hour - 4 hour' rule applies: such food must be consumed immediately or thrown away if it has been stored above 5 and below 60 degrees for two hours (four hours if it is in and out of refrigeration or hot storage). The Chinese practice of hanging roast duck and pork in shop windows at room temperature became contentious under this principle, so further study led to new guidelines being adopted, based on studies by the Victorian Food Safety Unit:

traditionally prepared BBQ pork, duck and chicken on the day of preparation are low risk products until they are cut up for sale. After carving the protection provided by scalding, surface drying and roasting in a salty-sugary glaze is lost and the products become perishable and potentially hazardous. (NSW FSA 2008: 10-11)

So the freshly roasted and glazed products can be hung at normal temperatures for longer periods, and only become 'potentially hazardous' when cut.

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<sup>11</sup> Infectious diseases are the target of the 'old public health', initiated in the 19th century. Though tempted, I cannot deal here with the 'new public health' focused on 'lifestyle' diseases, e.g. obesity.

<sup>12</sup> It is presumably coincidental that these were generally added after the relevant Council inspector was contacted in regard to the research. But if Heisenberg's principle can apply in physics, it can as easily apply in social research too!



Photos on window, 'BBQ Prince', Marrickville Road, Marrickville.

The NSW FSA (2008) recognises that traditional practices may be safe in their original context. Yet they point out that modern methods, such as centralised processing and larger batches may require more modern approaches (such as refrigeration). New foods (e.g. sushi) and the transfer of practices in food preparation from immigrant cultures require a clear understanding of those practices, as well as scientific analysis of the hazards. Authorities need to review the application of traditional standards to introduced techniques. Assumptions made on the basis of traditional Anglo-Australian standards may need to be challenged and checked against scientific evidence, as in the case of Chinese barbeque products.



## Conclusions

### Regulation and values

In the case studies we have seen a variety of regulatory regimes. The notion of regulation, in broad terms, can be conceived as working from the top down, through the control and protection of populations (Foucault 1991). We see this in the health standards of the Food Safety Authority and their application by Council inspectors. We also see instances of regulation working from the bottom up, through the expression and codification of consumer demands. A traditional economic model of consumer action is that of supply and demand: if the consumers want free range eggs they will buy them, even if they cost more. But the consumer movement has become political, and makes demands of regulatory (as well as other) authorities. Consumers become consumer activists, or *consom'acteurs*, in the French version which emphasises consumption as eating more than buying (Pleyers 2011). Contemporary consumers—eaters—may no longer have a one-to-one relation of trust with their supplier, but instead group together, conscious of their common interests as consumers. Whether they are environmentalists, animal liberationists, or observant Muslims or Jews, they demand guarantees of the provenance of what they eat. Ethical, health or religious demands can gain political traction through lobbying or organising, or may be expressed in legal terms as rights: the right to informed choice, or animal rights.

In these case studies, consumer requirements and demands for particular food standards have led to wide-ranging debates. Those standards may be regulated or enforced by state and local government; the ACCC and the Federal Court; or industry, consumer or religious bodies. They demonstrate a wide range of legal mechanisms, from formal to informal law.

Controversies and debates have been carried out in various public and official forums: a consumer magazine, media, court, and the technical reports of food regulating agencies. They invoke legal, ethical, scientific, cultural and commercial arguments, which are typically intermingled in public debate. And yet, when the bigger issues of secularism and religion, science and law are discussed in academic terms, they take on the appearance of self-contained universes, rotating in their own self-referential spheres.

In concluding this work in progress, I take a step back to the broad terms in which I began, in order to try to understand the interaction of those overarching discourses. Law is characterised by rights and rules. Science invokes reason and evidence. Religion draws on ethics and the traditional ties of community, while there are also important ethical considerations that do not draw on any specific liturgical or scriptural tradition.

Teubner (1989), coming from a German tradition that emphasises the self-referentiality of law, compares it to religion. Both are discourses that are separate from science, but which attempt to make their constructs 'at least compatible with recent developments in the sciences'.

Obviously, scientific facts collide with legal facts, but we are used to living with this collision, rationalizing it by invoking higher values, like legal certainty, or appealing to the relativism of our cultural provinces. (pp 744-5)

This suggests that, while institutional barriers isolate disciplines (in Foucault's sense) or institutional modes of deliberation, channels of communication may open up between them at other levels, such as that of values. This is a pervasive theme in studies of law, religion and science.

### Rights and rules: Law

In this study I have taken a broad approach to law, constantly noting the spectrum from the formal law of state and courts to the informal laws of self-regulation and religion. That spectrum is found in conceptual critiques, as well as in empirical studies of law. Luhmann (1989: 137-8) or Teubner identify the formal autopoiesis of law, even as they try to explain, or explain away, the wormholes by which other social influences or values may interpenetrate with law. Critics (eg from a critical legal studies tradition) emphasise the ideological functions of this reified symbolic power 'that can be exercised only through the complicity of those who are dominated by it' (Bourdieu 1987: 844). Formalism is the height of this reified system, which treats law as 'entirely distinct from all political, moral, and social values and institutions' (Shklar 1964: 33).

The value of a fine-grained study such as the present one is that it may explore those interstices and interpenetrations, to find out a little more of how it is that law can take account of scientific or ethical considerations. The mechanisms we see emerging in food regulation (both formal and informal) illustrate some of the critiques of formal reliance on deterministic rules. Schauer follows Wittgenstein's warning that rule-following is 'deeply problematic' and underdetermined.

But again as with any inductive process, the problem of underdetermination does not make induction in reality impossible. It does, however, make the inductive result dependent on contingent values lying outside the particulars around which the inductive generalization is constructed. (Schauer 1991: 185).

If rules do not determine outcomes, it is through the application of 'contingent', extra-legal (Teubner's 'higher') values that we again find the possibility of a circuit breaker, a wormhole that frees legal deliberation from the tyranny of rules.

To see some of these operations in practice in a multicultural context, we can turn to the Bouchard-Taylor report commissioned by the government of Québec, on 'accommodation practices related to cultural differences'. The sociologist Gerard Bouchard and the philosopher Charles Taylor were reporting within the framework of the Canadian Charter of Rights and Freedoms on the accommodation of minority cultural practices within a dominant québécoise society, which is concerned to maintain its own distinctive character in an Anglo-dominated North America. The legal language of the Charter emphasises 'rights' and 'reasonable accommodation', which implies that the dominant society should 'accommodate' foreign difference, leaving the 'right' in tact. Bouchard and Taylor (2008: 51-2) emphasise the need for dialogue and work on both sides to help overcome deadlocks of competing rights and zero-sum games. Their more constructive term is 'concerted adjustment': all parties need to understand each others' practices and beliefs, and find means by which they may be expressed. This shifts the paradigm from that of law to that of discourse, within and among communities.

'Concerted adjustment' is a further illustration of the possibility and need to reach across legal categories, like rights and rules, to find ways in which their intention may be worked out in practice. Similar approaches were identified in the case studies, as potential if not yet always actual solutions to ethical and cultural disputes over food. Consumers, animal rights activists, religious scholars, regulators, the courts and various branches of the food industry can draw on veterinary and ethological research and ethical, as well as legal, debate. These deliberations can help to apply and to define more widely accepted standards and to devise improved animal welfare practices. Food scientists and regulators can work with cooks to study cultural practices in food preparation. This can be combined with their knowledge of



bacteria and risks of contamination to improve food handling guidelines. In each case advances are made, not through application of rules and invocation of rights, but through the vigorous interplay of values that are open to debate.

### Rules and reason: Science

The notion of 'values' plays an interesting role in the dubious terms of the secularism vs religion debate, mentioned in opening this discussion. On the one hand militant secularists tend to associate 'values' with subjectivity and religion, and hence view them with some suspicion. On the other hand, there are certain values that are privileged by secularists. Brooke (2007) points to the increased incidence in the British media of the phrase 'Enlightenment values' since the terrorist attacks of September 2001.

The term appears most frequently in articles discussing the challenge posed to Western societies by varieties of Islamic fundamentalism. On the whole, it is the more muscular liberals who are keen on this particular political language, with its connotations of sturdy opposition to religious fanaticism. (p 151)

But which Enlightenment values are being promoted here? Brooke implies that liberalism, of a 'muscular' variety, is attractive to his interlocutors, and points to the importance of 'sharp scepticism' as an alternative preferred 'Enlightenment value'. Suskind, reporting a conversation with a White House aide of the George W. Bush era, pairs 'enlightenment principles' with empiricism (Mohr 2007: 106-7). These invidious distinctions and arguments over who is more 'enlightened' than whom simply illustrate the problem that Foucault (2000: 315) called 'Enlightenment blackmail'. The question 'what is Enlightenment?' raised so 'imprudently two centuries ago' (p 304) continues to exercise philosophers and commentators alike. The blackmail inherent in invoking the Enlightenment requires one to be either "for" or "against" it. Against what? If Foucault must sum this up in a word, it is 'rationalism' or 'rationality'. This is further problematised, of course, by noting that various schools are for or against that, too, when they buy into this discourse (p 315).

At least now we have three concepts that might be associated fairly reliably with this Enlightenment talk, or blackmail, if you prefer: liberalism, empiricism and rationality. Let's leave the first to one side: 'liberalism' is too partisan, too political to engage everybody. But empiricism and reason, surely, are values that can be widely supported and enlisted in public debate. Well, yes *but* ... They in turn need to be interrogated, and of course they must be given more than passing attention in any appreciation of the role of science in public life.

Brenner (2009: 86) points out that philosophy of science has in the last one hundred years made a journey from questions of justification (how induction and experiment are used and criticised) to questions of discovery and invention (how we choose between competing theories); in short, first empiricism was problematised, then rationality was. Attention has more recently 'focussed on rational values attendant on theory choice. This leads to a richer model of scientific rationality.' When Kuhn (1970) went down this path fifty years ago, he pointed out that we do not choose between scientific theories according to some *rules*, but according to particular *values*. The terms are familiar from our earlier discussion of legal formalism, and the parallels with a critical approach to law are even more striking as Brenner goes on:

[T]he criteria of choice are not rules, but values. No one of our values has primacy, and there is no order that prescribes their application. It is necessary to judge case by case. (Brenner 2011: 16 trans RM)

Rationality has value in itself, but to say so simply draws attention to the very fact that rationality is a value. Yet if it is to be operationalised as a means for choosing between theories, between preferred science and obsolete or 'bad' science, it requires more specificity. Brenner (2011: 4) breaks down the rational values into particular criteria for rational choice: coherence (or consistency), precision, simplicity, completeness and fecundity (or generativity). These are the judgements of value on which scientific reason itself rests. They were not determined by some empirical process, were not discovered in nature, are not 'evidence-based', are not adjudicated by 'rules'. They are values that we, the human authors of the scientific, and all the other enterprises, agree are worthwhile. How they are applied is worked out depending on the context, 'case by case'.

Rationality is at the same time a product of the mind (l'esprit) and a combination of words and signs; it is formulated in the context of a specific discussion. (Brenner 2011: 97 trans RM)

### Religion: a repository of values?

The turn to 'post-secularism', that I introduced at the outset, takes values seriously. The danger in religious versions (and that is what seems to be implied by 'post-secular') is that, just as rights live in law and—in a narrow view—reason lives in science, an equally narrow view may claim religion as the home of values. Steven D. Smith (2010) deplores the exclusion of a values discourse in the modern polity. He sums up the problem with that polity, and the discourse on which it is based, in the word 'secular'. Smith denies juxtaposing 'secular' with 'religious' discourse (pp 37-8), yet this is disingenuous when he has chosen a word that arose in a theological context, and currently refers to the separation of religion from matters of state. When he identifies the illicit 'smuggling' of ideas based on a 'purposive cosmos' or 'providential design' (p 26), his argument rests on the embeddedness of values in great views of the cosmic order. Yet values need not derive from grand cosmic or theological narratives. They can inhere in simple ethical precepts, from the humanistic bottom up, as well as from the theological top down.

What distinguishes religions from other ethical positions, even constellations, is their institutional, traditional and communal structure. This is a strength of religions: they offer membership of a bigger group and a rich body of lore, law and discourse. They are also hierarchical, and usually dominated by a professional class of priests, rabbis or imams. None of these characteristics is dangerous to the social fabric or the well being of the believers. Yet their very institutional qualities, their self-referential, professional and hierarchical character, can make them difficult models for open public discourse. Just as law must pronounce what is legal and illegal, cleaving normative reality, purportedly according to rules, so religious institutions must cleave the halal from the haram, the kosher from the terefah, according to internal referents. Formal religion, like formal law, tends to self-referentiality.

Davies (2011) and Cox (1965) have both conceived secularization as a process rather than an end point. Their positions emphasize the multiple parties and identities who may be involved in decisions over matters of faith and the polity. This can extend to law-making based on religion within limited communities. However, on Davies's account this would clearly be a space for open debate and multiple voices to be heard. By pluralizing involvement in religious, cultural, political and legal discourse, a diverse society may be more fully democratized than by simply accommodating religious and political hierarchies within a corporatist decision-making apparatus.<sup>13</sup>

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<sup>13</sup> This paragraph has been adapted from Mohr and Hosen (2011: 10).

Religion and secularism are not two opposed alternatives. Nor is religion (any religion) the legitimate guardian of values. Values, to reprise an old truism, are too important to be left to the priests.

### Last observations on law, science and religion

Throughout this study we have seen the interactions of values and scholarship, whether science, jurisprudence, animal welfare, ethology or vegetarianism. The study seeks an alternative way to understand the links between reason and religion, science and ethics, law and culture. Each is in dialogue with the other, so that regulatory regimes can be informed by a three way conversation between science, ethics and law. In this bottom-up model, driven by ethical, political or religious communities of consumers, there is potential for negotiation and effective communication. None of these systems need dominate the others. Neither science nor religion are 'conversation stoppers' in Smith's or Rorty's terms. Each has a perspective as well as investigative and communicative methods to bring to the table, to continue the conversation.

Neither law, nor science, nor religion is a stand alone, 'rational and objective exercise' (Darian-Smith 2010: 10-11). Each is connected to other discourses within a matrix of values and conditions derived from ethics, religions, social and material circumstances. Law, science and religion are all informed by values, such as truth, ethics and how the world is (now<sup>14</sup>). Reason itself is one value (among others) and is in turn constituted by other, more fundamental, values that guide our rational choice.

Law, religion, and even science, are often expressed as sets of rules. Yet rules do not tell the whole story; they do not apply themselves. Whether applying regulatory standards, choosing among scientific theories, or discerning good from evil, the context is as important as the rule. Each case is different, deliberations must always refer to contingent values, and we need to recognise the specificity of corporeality and the other (Taylor 1993: 49). Any important decision about what we eat and how to regulate food should draw on legal, scientific and ethical arguments, which are only as useful as their capacity to engage with each other, and to respect cultural and religious diversity.

### **References**

- Bouchard, G. and Taylor, C. 2008. 'Building the Future: A Time for Reconciliation. Abridged Report'. Québec: Consultation Commission on Accommodation Practices Related to Cultural Differences.
- Bourdieu, P. (1987) The Force of Law: Toward a Sociology of the Juridical Field, *Hastings Law Journal*, **38**, 814-853.
- Braidotti, R. 2008. 'In Spite of the Times: The Postsecular Turn in Feminism'. *Theory Culture Society* 25: 1-24.
- Brenner, A. (2011) *Raison scientifique et valeurs humaines: essai sur les critères du choix objectif*, Presses Universitaires de France, Paris.
- Brenner, A. (2009) A Problem in General Philosophy of Science: The Rational Criteria of Choice, In *French Studies in the Philosophy of Science* (Eds, Brenner, A. and Gayon, J.) Springer, ? Netherlands.
- Brooke, C. (2007) Light from the Fens?, *New Left Review*, **44**, 151-160.
- Cavia, B., Gatti, G., Martínez de Albeniz, I. and Seguel, A. G. 2008. 'Crisis of the Social and Emergence of Sociality in the New Scenarios of Identity. The San Francisco District of Bilbao.'. *Papeles de CEIC* 39. Centro de Estudios sobre la Identidad Colectiva, Universidad del País Vasco.
- Clemons, R. 2012. 'A Cagey Business'. *Choice* July 2012: 20-22.

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<sup>14</sup> Given the deep traditional roots of most religions, and the antiquity of their texts, it is sometimes necessary to remind the clerics of this little word.

- Cox, H. (1965) *The Secular City: Secularization and Urbanization in Theological Perspective*, SCM Press, London.
- Darian-Smith, E. 2010. *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*. Oxford: Hart.
- Davies, M. 2011. 'The Future of Secularism: A Critique' in Hosen, N. and Mohr, R. (eds.) *Law and Religion in Public Life: The contemporary debate*. Abingdon, Oxon: Routledge.
- Eagleton, T. 2010. 'The God Debate' *The Gifford Lectures*. University of Edinburgh.
- Economist* (2013) 'Food and Religion: A Meaty Question'. *The Economist*.  
<http://www.economist.com/news/international/21571419-who-should-regulate-kosher-and-halal-food-meaty-question> accessed 12 February 2013.
- Foucault, M. (2000) 'What is Enlightenment?' in *Ethics: Subjectivity and Truth*, Penguin, London, pp 303 - 319.
- Foucault, M. (1991) Governmentality, In *The Foucault Effect: Studies in Governmentality* (eds, Burchell, G., Gordon, C. and Miller, P.) Harvester Wheatsheaf, London, pp. 87-104.
- Habermas, J. 2008. *Between Naturalism and Religion: Philosophical Essays*. Cambridge, UK: Polity Press.
- Kuhn, T. S. (1970) *The Structure of Scientific Revolutions*, University of Chicago Press, Chicago.
- Lewis, S. (2011) Tackle Extreme Islam Before it's too Late, Liberal MPs Warn, In *Herald Sun*, 9 February 2011. Accessed 16 February 2011.
- Luhmann, N. (1989) Law as a Social System, *Northwestern University Law Review*, **83**, 136-150.
- Marx, K. 1970. *A Contribution to the Critique of Political Economy*. Moscow: Progress Publishers.
- Mohr, R. 2011. 'The Christian Origins of Secularism and the Rule of Law' in Hosen, N. and Mohr, R. (eds.) *Law and Religion in Public Life: The contemporary debate*. Abingdon, Oxon: Routledge.
- Mohr, R. and Hosen, N. (2011) 'Da Capo: Law and Religion from the Top Down', in *Law and Religion in Public Life: The contemporary debate* (eds, Hosen, N. and Mohr, R.) Routledge, Abingdon, Oxon, pp. 1-12.
- Mohr, R. (2007) Identity Crisis: Judgment and the Hollow Legal Subject, *Law Text Culture*, **11**, 106 - 128.
- New South Wales Food Safety Authority 2008. 'Potentially Hazardous Foods: Foods that require temperature control for safety'. Sydney.
- Pleyers, G. 2011. *La consommation critique : Mouvements pour une alimentation responsable et solidaire*. Paris: Desclée de Brouwer.
- Schauer, F. (1991) *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press, Oxford.
- Shklar, J. (1964) *Legalism*, Harvard University Press, Cambridge, MA.
- Smith, S.D. 2010. *The Disenchantment of Secular Discourse*. Cambridge, MA: Harvard University Press.
- Taylor, C. (1993) To Follow a Rule... In *Bourdieu: Critical Perspectives* (eds, Calhoun, C., LiPuma, E. and Postone, M.) Polity Press, Cambridge UK, pp. 45-60.
- Tierney, B. 1982. *Religion, Law and the Growth of Constitutional Thought 1150-1650*. Cambridge UK: Cambridge University Press.
- Teubner, G. (1989) How the Law Thinks: Toward a Constructivist Epistemology of Law, *Law and Society Review*, **23**, 727-757.

#### Cases

*ACCC v Baiada Poultry Pty Ltd & Ors* Federal Court of Australia VID974/2011 (Judgement reserved 16 April 2012)